No. 170.

Brf. of De Graffenreid for Def.

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SUPREME COURT OF THE UNITED STATES.

No. 170.

SUPREME LODGE OF THE KNIGHTS OF PYTHIAS,

vs.

JOSEPHINE R. WITHERS.

BRIEF AND ARGUMENT OF EDWARD DE GRAFFENREID FOR THE DEFENDANT IN ERROR.

SUPREME COURT OF THE UNITED STATES.

No. 170.

SUPREME LODGE OF THE KNIGHTS OF PYTHIAS,

vs.

JOSEPHINE R. WITHERS.

BRIEF AND ARGUMENT OF EDWARD DE GRAFFENREID FOR THE DEFENDANT IN ERROR.

STATEMENT OF CASE.

On the 3rd day of March, 1896, the defendant in error commenced this suit in the Circuit Court of Hale County, Alabama, against the Plaintiff in error, on an Insurance Policy or Benefit Certificate issued by the Plaintiff in error on the 29th day of September 1885 on the Life of Robert W. Withers. The Complaint in the case was in the following words:

JOSEPHINE R. WITHERS, Plaintiff

vs.

SUPREME LODGE KNIGHTS OF PYTHIAS, DEFENDANT.

The Plaintiff claims of the defendant, the Supreme Lodge Knights

of Pythias, a Corporation duly organized and existing by virtue of an Act of Congress of the United States on the 29th day of June 1894, and which is doing business in Hale County, Alabama, the sum of three thousand dollars due by a certain instrument or Policy of Insurance upon the life of R. W. Withers, and which is in words and figures, as follows :—

No. 11072. *Certificate of Membership.* Fourth class. $3,000.

Endowment Rank Knights of Pythias.

This certifies that Brother Robert W Withers received the Endowment Rank of the Order of Knights of Pythias in Section No. 432 on March 2, 1883, and is a member in good standing in said rank. And in consideration of the representations and declarations made in his application bearing date of January 1st, 1883, and his absolute surrender of the Certificate heretofore held by him in First and Second Classes for cancellation, as requested in his application for transfer to the Fourth Class, bearing date of August 13th 1885, all of which is made a part of this contract and the payment of the prescribed admission fee ; and in consideration of the payment heretofore to the said Endowment Rank of all monthly payments as required, and the full compliance with all the laws governing this right, now in force or that may hereafter be enacted, and shall be in good standing under said laws, the sum of three thousand dollars will be paid by the Supreme Lodge Knights of Pythias of the World to Josephine R. Withers, wife, as directed by the said Brother in his application, or to such other person or persons as he may subsequently direct by change of beneficiary ; entered upon the records of the Supreme Secretary of the Endowment Rank, upon due notice and proof of death, and good standing in the Rank at time of death, and surrender of this Certificate.

Provided, however, that if at the time of the death of said Brother one monthly payment to the Endowment Fund by members holding an equal amount of Endowment shall not be sufficient to pay the amount of Endowment held by said Brother, the benefit to be paid in case of death shall be a sum equal to one payment to the Endowment Fund by each member holding an equal amount of Endowment—

And it is understood and agreed that any violation of the within mentioned conditions or the requirements of the laws in force governing this right, shall render this certificate and all claims null and void, and that the said Supreme Lodge shall not be liable for the above sum or any part thereof.

(Signed) JOHN VAN VALKENBURG,
Supreme Chancellor.

Attest: R. E COWAN,
[SEAL.] *Supreme Keeper of Records and Seals.*

Issued this the 29th day of September, 1885, P. P. No. 11 at Washington, District of Columbia, and registered in Book 1, folio 222.

HAHN NELSON,
Supreme Secretary.

And the plaintiff avers that the said Valkenburg, R. E. Cowan and H. Nelson who signed the said above described instrument, were authorized by the said defendant to issue the same; that they duly executed and delivered the same to the said R. W. Withers for the benefit of this plaintiff; that the said R. W. Withers from the issuance of said certificate to the time of his death complied with all the reasonable and legal requirements of said corporation; that he regularly paid all assessments due by him to the said corporation on account of the said certificate, and duly paid all the premiums on the said instrument above described; that the said R. W. Withers departed this life in Greensboro, Hale County, Alabama, in good standing with the said corporation, under all the reasonable rules and legal regulations of the same, on November 1st, 1895, leaving this plaintiff, his widow, surviving.

Plaintiff further avers that, at the time of the issuance of said policy the said defendant was a corporation organized and doing business under the laws of the District of Columbia, and that on the 29th day of June 1894, the said corporation was re-incorporated by the said Act of Congress above described; that the said corporation, the Supreme Lodge Knights of Pythias created or re incorporated by the said Act of the 29th day of June 1894, was in fact the same corporation which issued the said certificate; that the said corporation created by the Act of the 29th day of June 1894, became the possessor of all the rights and assumed all the liabilities of the said corpnration which issued the said certificate, and that after the said 29th day of June, 1894, the said R. W. Withers regularly paid to the Endowment Rank of said Supreme Lodge Knights of Pythias all amounts due by him as a holder of said certificate or as a member of the said order.

And this plaintiff avers that the said Supreme Lodge Knights of Pythias was, at the time of the issuance of the said certificate and is now, a company authorized by its By-Laws and by the Articles of its Incorporation to insure the lives of its members for the benefit of those dependent upon them.

The plaintiff avers further that this plaintiff notified the legally constituted officers of the said defendant of the death of the said R. W. Withers, and called upon them for payment and for blanks upon which to make the customary proof of death, but that the said legally appointed and constituted officers of said defendant refused to furnish this plaintiff with any blanks for said purpose, and notified this plaintiff that under no circumstances would the said defendant pay the said sum due upon the said certificate or instrument in writing or any part of the same, and which said sum of money, with interest thereon, is now due

and unpaid, and the plaintiff brings suit.

SEAY & DE GRAFFENRIED,
Attorneys for Plaintiff.

Filed March 3rd, 1896.

Thereupon by proper proceedings and orders of Court, the said cause was removed to the Circuit Court of the United States for the Southern Division of the Northern District of Alabama, by an order of the Circuit Court of Hale County, Alabama, made on the 23rd day of October, 1896.

The case was by consent of all the parties transferred from the Circuit Court of the United States for the Southern Division of the Northern District of Alabama, to the Circuit Court of the United States for the Middle Division of the State of Alabama, and was tried in said Court on the 6th day of July 1897, on the following pleadings, shown in the following agreement of counsel

Agreement of Counsel Under Which Case Was Tried.

In the Circuit Court of the United States for the Middle District of Alabama, May term, 1897.

SUPREME LODGE KNIGHTS OF PYTHIAS
vs
JOSEPHINE R. WITHERS.

Be it remembered that at the May term 1897, of the Circuit Court of the United States for the Middle District of Alabama, the following proceedings were had in said cause:

The parties by their attorneys made and filed in open Court the following agreement, under which the demurer to the Complaint was withdrawn, and under which the case was tried. and Court and parties waived the filing of formal pleas and replications in this case. The Agreement of Counsel was as follows:

"In this case it is agreed that the same shall be tried upon the Complaint and upon pleas setting up the general issue and a forfeiture of the Certificate sued upon, with leave to give in evidence any fact which might be specially pleaded to the cause of action set out in the Complaint, and with like leave on the part of the plaintiff to give in evidence any fact which in rebuttal of any such plea or in confession and avoidance thereof.

"It is further agreed that if the plaintiff is entitled to recover, she is entitled to recover the sum of three thousand dollars, the amount of the certificate, with interest from the 5th day of November, 1895. If the Court shall be of opinion that the law upon the evidence is for the plaintiff, it shall charge the jury to find a verdict for the plaintiff for three thousand dollars and interest from November 5th, 1895; other-

wise it shall charge the jury to find for the defendant.

(Signed) ED de GRAFFENRIED,
C. E. WALLER,
H. C. TOMPKINS,
Attorneys for Plaintiff.

THOS. G. & CHAS. P. JONES,
Attorneys for Defendant.

There was jury and verdict for plaintiff in the Court below for the sum of $3,392.54, and defendant appeals.

EVIDENCE

The plaintiff offered in evidence the following:

Agreement as to testimony of S. W. Chadwick.

It is admitted in this case as follows:

That S. W. Chadwick, if present would testify as follows:

"My name is S. W. Chadwick, and I am now and have been for more than 20 years the Secretary of No. 432, Endowment Rank Knights of Pythias of the World. Robt. W. Withers was a member of said Rank, and he has paid over to me regularly as the Secretary of said Rank his dues on account of his policy No. 11,072, and the money was regularly remitted to the Secretary of the Board of Control at Chicago. The last payment that was made to me by Col. Withers was for the dues for the month of October, 1895, which money was paid to me prior to the 10th day of October, 1895. There were large numbers of men who were members of said Section and as I did not collect from all of them their dues until the latter part of October, I did not send the money to the Board of Control at Chicago until the 31st day of October 1895. Having collected by the 31st day of October 1895 all the dues due by all of the members of said Section for the month of October, I mailed in the afternoon of October 31st, 1895, to H. B. Stolte, Secretary of the Board of Control, Chicago, Ills., a check covering all amounts due by all of the members of said Section for the month of October. At that time the mail was made up in Greensboro ~~was made up~~ early in the evening, and when letters were placed in the post-office after the mail was made up the postmaster, such letters went into the mail of the next day. As Secretary of the Section I kept a set of books, and my books show, and I positively recollect that I mailed the letter with a check for money on the afternoon of the 31st of October 1895. I sent the money by a check just as I had always previously done.

It has never been the custom at my office for me to send the money off by the 20th of the month. I usually sent the money off about the last days of the month. For the previous year I had mailed to the

Secretary of the Board of Control the dues of the Section as follows: October 27th, 1894, November 28th, 1894, December 29th, 1894, January 29th, 1895, February 27th, 1895, March 30th, 1895, April 29th, 1895, June 29th, 1895, July 28th, 1895. August 29th, 1895, September 28th, 1895, October 31st, 1895, all of which sums were accepted by the Board of Control.

When the money reached Chicago after the first of the month, Mr. H. B. Stolte mailed to me as Secretary of Section No. 432, a letter, a substantial copy of which is hereto attached, marked Exhibit X for identification. These letters I always destroyed and did not inform the members of the Section of the receipt of them, as I knew the money had reached Chicago by the time I received the letter. I am a Banker and Insurance Agent."

It is admitted that no notice was ever mailed at any time by the Secretary of the Board of Control, or any other member thereof, to Col. R. W. Withers notifying him of his suspension by reason of the failure of the Secretary of Section 432 to remit the dues of the Section to the Board of Control on the first day of the month succeeding the month in which said dues became due.

It is admitted that Robert W. Withers, named in policy No. 11,072, died of an attack of cholera morbus on November 1st, 1895, and that he was taken sick and died on that day, and that proof of death has been waived by the defendant, and on the 5th day of November, 1895, defendant refused to pay the amount of the certificate, or any part of it, denying any and all liability on such certificate.

(Signed) ED. DE GRAFFENRIED,
H. C. TOMPKINS,
Attorneys for Plaintiff.
CHAS. P. & THOMAS G. JONES,
Attorneys for Defendant.

Letter from Board of Control.

EXHIBIT X.

Office of Board of Control, Endowment Rank Knights of Pythias.

Chicago, November 1st, 1895.

S. W. Chadwick, Secretary Section 432, Endowment Rank Knights of Pythias:

DEAR SIR AND BROTHER:—You are hereby notified that the above Section having failed to pay the monthly payment and dues for the month of October, 1895, as required under Article 4, Section 6 of the general laws, the section and all members thereof stand suspended and

such members certificates have thereby become forfeited.

Under provisions of said law, the section may regain all rights as a section and any surviving members thereof, not less than five, may regain full rights and privileges, if within thirty days from the date of suspension payment of all monthly payments, assessments of dues, accrued upon said members is made to the Board of Control.

Less than five members of a section so suspended may upon the payment to the Board of Control within thirty days from suspension of all accrued monthly payments, assessments or dues, and fifty cents each for a clearance card, regain membership and all rights and privileges attached thereto, whereupon clearance cards will be issued them, such members shall be held subject to all requirements governing the issue of clearance cards as provided for in Article 4, Section 8, of the General Laws.

The Board of Control expresses the hope that the membership will avail themselves of the privileges thus afforded by law, and cause immediate payment of all arrearages to be made.

Fraternally yours,

(Signed) H. B. STOLTE,
Sec'y Board of Control.

The plaintiff then introduced in evidence the Policy of Certificate of Membership sued on, a copy of which is set out in the Complaint.

The plaintiff then introduced Section 4 of General Laws, adopted and promulgated by the defendant on January 25th, 1894.

"Section 4, Monthly payments and dues of members holding certificates of endowment shall be due and payable to the Secretary of Section without notice on the first day of each and every month; and a failure to make such payment on or before the 10th day of each month shall cause, from and after such date, a forfeiture of the Certificate or Endowment and all right, title and interest such member or his beneficiary may have in and to the same, and membership shall cease absolutely. In case of such forfeiture, membership may be regained by making application in the form prescribed for new applicants, the payment of required membership fee and surrender of the forfeited Certificate. If approved by the Medical Examiner in Chief and accepted by the Board of Control, a new certificate shall be issued and the rating shall hereafter be at the age of the nearest birthday to the date of the last application."

It is agreed that said above General Law has never been repealed and still exists as a law of the corporation, the defendant in this suit, and has existed as such ever since January 25th, 1894, and the same, subject to legal exception, may be had in evidence in this cause, the cause being Josephine R. Withers, vs. Kights of Pythias of the World.

Indorsed: Filed June 23rd, 1897. J. W. Dimmick, Clerk.
(Signed) ED. DE GRAFFENRIED,
H. C. TOMPKINS,
Attorneys for Plaintiff.
THOS. G. & CHAS. P. JONES,
Attorneys for Defendant.

And also introduced the following General Law of the Endowment Rank:

Art. IV, General Laws Endowment Rank.

"Each applicant for membership in the Endowment Rank shall upon completion of his application for transmission to the Board of Control, pay to the Secretary of the Section, in accordance with his age and the amount of endowment applied for, a monthly payment as provided in the following table, and if accepted, such member shall continue to pay the same amount each month thereafter as long as he remains a member of the Endowment Rank, unless otherwise provided for by the Supreme Lodge or Board of Control of the Endowment Rank Knights of Pythias of the World,"

It is agreed that the table shall not be set out, but that the amount to be paid by Withers, according to the table, was $4.90 per month.

(Signed) H. C. TOMPKINS,
ED. DE GRAFFENRIED,
Attorneys for Plaintiff.
THOMAS G. & CHAS. P. JONES,
Attorneys for Defendant.

The above was all the evidence offered by the plaintiff.

The defendant then introduced in evidence the following agreement of counsel:

Agreement of Counsel.

"It is admitted in this case that R. W. Withers originally had certificate in the First and Second Class, and that said certificates were issued on an application dated January 1, 1883, the original of which is hereto attached and which is the application referred to in certificate No. 11,072, being the certificate sued on in this case, and set out in the original complaint.

"That R. W. Withers died Nov 1st, 1895. It is further admitted that the dues for the month of October, which were payable by said Withers by virtue of the Certificate above described, were included in a check, and sent by S. W. Chadwick with his remittance dated Octo-

ber 31st, 1895, which said remittance was received by the Board of Control on the 4th day of November, 1895. That H. B. Stolte, Secretary of the Board of Control, on the first day of November 1895, no remittance for the October dues of Section 432 [of which said R. W. Withers was a member) having reached the Board of Control, sent S. W. Chadwick a letter, which is attached to a statement of his testimony. That on receipt of said remittance on the 4th of November 1895, that H. B. Stolte sent to S. W. Chadwick a receipt on a Postal Card, a copy of which is hereto attached. That as soon as the Board of Control learned of the death of R. W. Withers, it returned to S. W. Chadwick, Secretary, by Registered letter, under date of November 5th, 1895, the amount of the October dues of the said Withers, but said S. W. Chadwick returned it to the Board of Control, where it is now held to his order. That the following General Law was adopted by the defendant in January 1894, and has never been repealed and is still in force.

"Sec 6. The Secretary of the Section shall forward to the Board of Control the monthly payments and dues collected immediately after the 10th day of each and every month.

"If such payment and dues are not received by the Board of Control on or before the last day of the same month the Section so failing to pay, and all members thereof, shall stand suspended from membership in the Endowment Rank; and their certificates and all right, title and interest therein shall be forfeited. Notice of such suspension shall be forthwith mailed by the Secretary of the Board of Control to the President and Secretary of such Section.

"Provided, that the Section whose membership has forfeited their endowment, and whose warrant has been suspended, shall regain all right as a Section, and any suviving members thereof (not less than five) shall regain full rights and privileges held previous to such forfeiture, if within thirty days from suspension of warrant said Section shall pay to the Board of Control the amount of all monthly payments, assessments and dues accrued upon said members.

"Sec. 10. Sections of Endowment Ranks shall be responsible and liable to the Board of Control for all moneys collected by the Secretary or other officers from the members for monthly payments, assessments or dues not paid over to the Board within the time and manner prescribed by law. Officers of Sections are the agents of members, and shall in no wise be considered as the agents of the representatives of the Board of Control of the Endowment Rank of the Supreme Lodge."

(Signed) H. C. TOMPKINS,
ED. DE GRAFFENRIED,
Attorneys for Plaintiff.

THOMAS G. & CHAS. P. JONES,
Attorneys for Defendant.

The defendant then introduced in evidence the application for membership of Robert W. Withers in the Endowment Rank Knights of Pythias, set out in the Transcript, the only part of which having any materiality to the issues, is in the language following:

"I hereby agree that I will punctually pay all dues and assessments to which I may become liable, and that I will be governed, and this contract shall be controlled by all the laws, rules or regulations of the order governing this Rank now in force, or that may hereafter be enacted, or submit to the penalties therein contained. To all of which I willingly and freely subscribe.

Dated at Greensboro, Ala., this the first day of January, 1883.

(Signed) ROBERT WALKER WITHERS,

Member of Eureka Lodge No. 29, Knights of Pythias, City of Greensboro. State of Alabama."

The defendant also introduced the Medical Examiner's certificate, certificate of Lodge and report of Committee on Character, set out in the Transcript, but immaterial to any question involved in this case.

The defendant then introduced the following remittance envelope: Postmark: Greensboro, Alabama, November 1st, 1895. Endowment Rank, Knights of Pythias. If not called for in ten days return to S. W. Chadwick, Banker, Greensboro, Ala. This envelope bore the following directions: Board of Control, Endowment Rank, Knights of Pythias, rooms 43 to 49, Commerce building, 14 & 16 Pacific Ave, Chicago, Ill.

The defendant then introduced the remittance sheet, found set out in Transcript, which is immaterial to any issue here presented.

The above was all the evidence material to the issue in this cause, and the Court thereupon gave to the Jury the charge in writing, at the request of the Plaintiff, to find a verdict for the Plaintiff for the sum of Three Thousand Dollars, with interest from the 5th day of November 1895. To the giving of which charge the defendant then and there duly excepted.

The defendant also asked the Court to charge the Jury that if they believed the evidence, they must find for the defendant, but the Court refused to give said charge, and the defendant then and there excepted.

ARGUMENT.

The Record discloses that the appellant, The Supreme Lodge of the Knights of Pythias, is a corporation organized for a dual purpose. In the first place it is a social organization. In the second place it furnishes Life Insurance to such of its members as desire it. It is, so far as this case is concerned, a Benefit Society or Mutual Benevolent Life

Insurance Organization. For the superintendence of the Organization, it has a Supreme Lodge, its members being banded together in Subordinate Lodges. For the superintendence of its Insurance Deparment it has its Board of Control. Those holding its insurance are members of its Endowment Rank, the insured members of a local or Subordinate Lodge forming a Section. Not all the members of a Local Lodge are members of the Section, but all members of a Section are members of the General Order of Knights of Pythias. Its Life Insurance Department was formed, not for the profit of the Organization, but to provide an indemnity for the wives and children of its members against the loss by death of the head of the household. Such organizations have been termed the "poor man's life insurance companies." They furnish to those of moderate incomes a cheap and simple substitute for life insurance.

Bacon on Benefit Societies and Life Insurance, page 3. Section 3.

For the above reason it has always been the law that, "in the case of benefit societies, the contract must be construed liberally in order to carry out the benevolent object of the creation of these organizations."

Bacon on Benefit Societies and Life Insurance, page 226, Section 178.

This liberality of construction is, however, for the benefit of the certificate holder that the purpose for which he becomes a member may not be defeated; not for the benefit of the Society, that the certificate holder may be easily deprived of his rights.

Where a Forfeiture is involved, strictness of construction is the rule. Courts will seize upon technicalities to prevent forfeitures.

In the case at bar, Col. Robert W. Withers took out a policy of Life Insurance for Three Thousand Dollars, for the benefit of the plaintiff in the Court below, his wife, on the 2nd day of March, 1893, and from that day till the day of his death, which occurred on the first day of November, 1895, he complied with all of the rules and regulations of the order and regularly paid over to the officer authorized to receive it, his monthly dues or premiums. By the rules of his order, he was required to pay over to the Secretary of his Section his dues by the 10th of the month. His last dues were paid over before the 10th day of October, 1895, to S. W. Chadwick, the Secretary of his Section, as required by the regulations of his Order.

Chadwick was required to transmit the money to the Board of Control at Chicago by the 20th of the month, with the proviso that if "such payments and dues are not received by the Board of Control on or before the last day of the same month, the Section so failing to pay, and all members thereof, shall stand suspended from membership in the Endowment Rank and their certificates and all rights, title and

interest therein shall be forfeited."

Chadwick forwarded the money to the Board of Control on the last day of of October Col. Withers died on the following day, November 1st, and it is contended that the appellant is not liable because of Chadwick's delay.

The above contention is based on the assumption that Chadwick was the agent ot Withers for the purpose of forwarding money, not the agent of the Company.

Section 4 of the General Laws of the Order required Withers under a penalty of a forfeiture of his policy, to pay the money to Chadwick by the 10th day of the month. He was not permitted to pay the money to the Board of Control. Chadwick was the only person to whom he was permitted to make payment.

This contention that the Plaintiff in error is not liable in this action grows out of the following part of Section 10 of a General Law adopted by the defendant in January 1894, viz:

"Officers of Sections are the agents of the members and shall in no wise be considered as the agents or representatives of the Board of Control of the Endowment Bank or of the Supreme Lodge."

To use the language of Chief Justice Marshall, in the case of Yeaton vs. Fry, 5 Cranch, 341: "The words are the words of the insurer, not of the insured." The question as to whether such a by-law of a beneficient society is operative in a case like the present was directly before the Court in the case of Whitesides vs. Supreme Conclave Improved Order Hephtasophs (Circuit Court E. D. Tennessee, S. D. Feb. 4, 1897,) 82 Fed. Rep. pages 275, 276 and 277. In that case the defendant was a Benefit Society. In that case payment was made to an officer of the local lodge, after the time for payment had elapsed, and the money was returned by such officer, who had consented to give time. In that case under the Constitution and by-laws of the defendant, "the officers of a subordinate Conclave shall at all time be deemed and held to be agents and servants of the members of the Conclave of which they were elected officers, and not in any sense the agents or servants of the Supreme Conclave for any purpose whatever, and that all acts of any such officers relating to a benefit certificate shall be held and deemed to be the act of the person nolding such certificate, and shall not be binding upon the Supreme Conclave."

In his charge to the jury on this subject, the Judge. (Clarke, District Judge) said: "Notwithstanding the provision of the Constitution and by-laws O'Donohue was the agent of the Supreme Conclave in the matter of collecting the assessments, and that his acts in extending the time of payment were binding on the defendant. The Court said in substance that it was not competent by declaration made in advance to deny the real fact and its effect, and require the Court

to hold what is known to be contrary to the truth. This would neither be good law nor good morals. When officers of the local order act distinctly for the general order, as in collecting and remitting assessments, the Court and Jury must not be expected to find directly against the plain truth. Exemption from liability must be claimed otherwise than upon a false statement of fact."

A motion for a new trial was made in the above case, but the Court in a carefully considered opinion, adhered to the above view.

In the case of Knights of Pythias of the World—the identical party to this record—vs. Bridges, from the Civil Court of Appeals of Texas, January 20th, 1897, 39th South Western Reporter, pages 333, 334 and 335 the same conclusion was reached In that case the Court says:

"All the powers of the local sections of the order were derived from the Supreme Lodge and Board of Control as were all the powers of every officer of the inferior lodges. The subordinate lodge was organized under a warrant of authority issued by the Board of Control, supreme officers of the order, with warrant authorized the local lodge to admit persons to membership "according to the laws of the order as promulgated from time to time by the Supreme Lodge and the Board of Control of the Endowment Rank." Bridges was admitted as a member of the local lodge under the forms, and according to the laws of the order, as promulgated by the Supreme Lodge and Board of Control. The powers of the local lodge and its officers were derived from and conferred by the Supreme Lodge and the Board, and it was organized by express warrant of the Board.

"We do not hesitate to say that the inferior lodges and their officers acting in the scope of their authority, were the agents of the order, and that their knowledge of the facts affecting their duties would be notice to the Supreme Lodge of such facts, as in the case of agents of ordinary insurance Companies. The Court did not err in so instructing the Jury."

And generally it may be said. "that the fraud or mistake of a knavish or blundering agent, done within tne scope of his powers, will not enable the Company to avoid a policy to the injury of assured, who innocently became a party to it, though a stipulation in the policy provides that such agent shall be deemed the AGENT OF THE INSURED."

Bacon on Benefit Societies &c, Section 426, and authorities cited.

In fact, this effort by a by-law, to shift resonsibility and to make the real agent of the insurer the agent of the insured, is an ancient device an old trick, much resorted to by insurance companies, but which the Courts have long since exposed. As has been well remarked by the Supreme Court of the United States in discussing this subject: "there is no magic in mere words to change the real into the unreal. A device of words cannot be imposed upon a Court in place of an actuality of fact."

Bacon on Benefit Societies, Sec. 153.

Ins. Co. vs. Wilkerson, 13 Wallace, 235.

There is no distinction in this regard between a stock company and a mutual company.

Bacon on Benefit Societies, etc., Sec. 156, and cases cited.

That Chadwick was the agent of the Order and not of Withers, and that the above is the proper construction of the bylaw, is shown by the language of the by-law itself. The language of the by-law is: "Monthly payments and dues of members holding Certificates of Endowment shall be DUE AND PAYABLE to the Secretary of the Section without notice, on the first day of each and every month; and a failure to make such PAYMENT on or before the 10th day of the month shall cause, from and after such date, a forfeiture of the Certificate of Endowment, etc."

The by-law says that Withers should make payment to Chadwick. If Chadwick was Wither's agent, Withers could not make PAYMENT to Chadwick The delivery of money by the principal to his agent, for another, is not a PAYMENT.

"Payment is the transfer of money from one person, the payor, to another, the payee"

Rapelje & Lawrence Law Dictionary.

The case relied upon by appellant to sustain its view on this subject is the case of Campbell vs. Supreme Lodge, Knights of Pythias of the World, decided by the Supreme Court of Massachusetts, on the 21st day of May, 1897. This case of Campbell's is somewhat similar to the case at Bar. It differs from it, however, in a number of material points. In the first place, the by-law under discussion, was adopted in 1894. In Campbell's case the record does not disclose when the policy was issued. It may have been issued after the adoption of said by-law. In the case at Bar the policy was issued long before the adoption of the by-law, was an Alabama contract and under the laws of Alabama, while a party may contract to be bound by future by-laws, the Courts engraft upon that contract the stiplations that such future by-laws shall be reasonable or they are void. (See Supreme Commandary, etc., vs. Ainsworth, 71 Ala, 436.) In Campbell's case we are not informed as to what stipulations were contained in the policy or in the application for the same, and for aught we know the by-law was incorporated in the policy and formed a part of the same. In the case at Bar the policy is before us, and it contains the express stipulation that the Company would pay: "In consideration of payment hereafter to said Endowment Rank of all monthly payments as required and the full compliance of all the laws governing this Rank, now in force, or

that may hereafter be enacted, and shall be in good standing under said laws, the sum of three thousand dollars, etc." Here was the CONTRACT between Withers and the Plaintiff in Error, and on the part of Withers it was carried out in its every detail. There was no failure to perform its stipulations on his part. It is admitted that Withers paid the premiums as required, and so far as his acts were concerned had complied with all the laws and requirements of the Order. Did he contract to do anything more? If he did, the policy which is the evidence of the contract does not disclose it. The agreement, as shown by the policy, was, that if he paid the monthly payments as required, and complied with the laws of the Order, the Company would pay, etc. It is admitted as stated above, and shown by the record, that Withers did pay his monthly payments as required by the laws of his Order, and that he did comply with all of its requirements. No part of his contract was left unperformed at the time when the Plaintiff in Error was called on to discharge its agreement. The contract set out above and set out in the Complaint, is the basis of the recovery sought in this suit; it obligated Withers (under the laws introduced in evidence and set out in the transcript) to pay to the Secretary of his Section, on the completion of his application the amount called for, and determined by his age and the amount of endowment applied for (Art. 4, General Laws, Endowment Rank); and to pay each month the policy continued in force, the same amount. Section 4, of the General Laws, promulgated January 25th, 1894; required that this monthly payment should be made before the 10th day of the month to the Secretary of the Section. These were the laws with which personal compliance was possible, and therefore these were the laws he contracted to comply with. He was not the Secretary of his Section, and could not forward himself, to the Board of Control the assessment. That power had been taken from him by the act of the Plaintiff in Error, and in making the monthly payment before the 10th day of each month, he discharged every obligation he had assumed in the contract, as shown by the Policy, and became entitled to a performance by the Plaintiff in Error of the obligation assumed by it.

In Cambell's case, it seems to have been admitted by the attorneys that a forfeiture had occurred. This admission may have been made by reason of some clause in that policy, which is not contained in Wither's policy, for it is upon this supposition alone that we are able to explain why such an admission should have been made. In fact, the question now under consideration was not discussed by the Court in the Campbell case.

See Supreme K. of P. vs. Campbell, 47 N. E. Rep, page 109.

But further:

If the by-law is applicable, and if Chadwick was Wither's agent, we submit that the Plaintiff in the Court below was entitled to recover be-

cause the money was placed in the mails by Chadwick for transmis mission to the Board of Control before the death of Withers.

The by-law provides that a Section failing to pay the monthly payment on or before the last day of the month shall stand suspended, etc.

"Provided that the section whose membership has forfeited their endowment, and whose warrant has been suspended, shall regain all rights as a Section, and any surviving members thereof (not less than five) shall regain full rights and privileges held previous to such forfeiture, if within thirty days from the suspension of such warrant said Section shall pay to the Board of Control the amount of all monthly payments." etc.

The laws of Benefit Societies generally provide that a member suspended for non-payment of assessment may be restored upon doing certain acts.

On principal these laws are to receive a liberal construction."

Mason vs. Grand Lodge A O. U. W., 30 Minn. 509, 16 N. W., 395.

In Dennis vs. Mass. Ben., 47 Hun. 338, the facts were these: "The defendant issued to one Dennis a certificate of membership, to which were annexed rules and conditions; one of which required that the member should, within thirty days after the mailing of a notice of assessment, pay the same, and provided that if the assessment should not be received by the Company within the time, the contract should lapse and be void, but that "for valid reason to the officers of the Associations (such as a failure to receive notice of assessment) he may be reinstated upon paying assessment arrearages." On February 12th, 1896, a notice of an assessment was mailed to Dennis and received by him, but was not paid within the thirty days, he being stricken with apoplexy on March 8th, and remaining unconscious till March 10th when he died. The beneficiary, on March 31st, tendered the arrearages to the Company, which declined to receive them and refused to be bound by the Policy."

The court said:

"The action was brought by the assignee of the beneficiary, and on the trial the Court directed a verdict for the defendant. On appeal it was held that this was error, that the question as to whether the fact that the party assessed who had paid many previous assessments, was rendered powerless by sudden paralysis before the expiration of the thirty days was not a "valid reason" within the meaning of the contract, should have been submitted to the Jury. In this case the majority of the Court say: What right would the member have had if he had recovered his reason on the day he died? In the first place the words were intended to be operative. The defendant obtained the premiums or agreement to pay assessment upon them. They assured the members that if a valid reason was furnished for default it should

not be conclusive. The use of the restriction as to the validity of the excuse to the officers of the Company did not mean to make them sole arbiters of the validity of the reason. The Company illustrated by citing an instance of a good excuse by the term "such as failure to receive notice of assessment." If an assessment notice had not been received without the fault of the member, can it be doubted but that the officers were bound to acknowledge it and reinstate the member upon payment of arrearages? The Company say that is a good excuse, and impliedly say that other good reasons for default must be acknowledged also. The Court of Appeals have decided that a discretion given to a Trustee is not personal. Is the reason assigned a valid reason under the contract? There can be no donbt of this fact. The assessed had thirty days, and before he paid the assessment he was rendered powerless by sudden calamity, his intent to pay is manifest by numerous previous payments. This was the construction put on the rule by the defendant.

They, again, after he was unconscious, notified the member of his forfeiture for non-payment, and that the contract might be renewed if in good health. This condition in respect to good health is not in the rule, and the officers had no right to add it to the rule. If a valid reason existed for the default the member must be reinstated, because of the valid reason for the default, and not because he had a valid reason and was in good health The rule as created by the Company in this respect would exclude cases where it was valid that they should be included in the contract. If the good reason was rejected in cases of ill health or death, the insured would lose a real value in the contract. If members become sick or die, the policy is at an end no matter how completely the default may be excused. This would make a very unfair contract, not within the words of the rule, and one which the Company would be unwilling to print in its rules."

In the case at Bar, Withers was a "surviving member of the Section," when the money was forwarded to the Board of Control. There was no necessity for the beneficiary here to tender money as in the case above cited. Withers himself, before his death, had done all that could be done, but because he dies while the money is in course of transmission, the benefit of his certificate is denied his beneficiary. The members who were living when the money reached Chicago (but who had done no more than Withers) incurred no forfeiture. Why should the fact of Withers death operate to deprive him of the benefit of a full and complete compliance with the rules and laws of the Company. As was said by the Court below, Bruce, Dist. Judge: "Again, can this scheme of insurance shown in the rules and law of the defendant be sustained upon sound legal principles? When the money for the monthly dues was received by the Board of Control in Chicago a receipt, signed by H. B Stolte, Secretary of the Board of Control of the following purport was received by Secretary Chadwick, of the local

section: "Received in payment of the monthly dues for October 1895, on condition that all members from whom above payment is made were living at the date of this receipt," which is November 4th, 1895. It was said in the argument, in reply to the proposition insisted upon, that the defendant Company had and retained the money and was, therefore, not in the position to resist the payment of the loss, that this was but a conditional receipt, or receipt upon condition, for the money, and that may have been an answer to the proposition presented in behalf of the Plaintiff herein, but apart from that, here is a scheme of insurance which provides in case of forfeiture a way of recovery for surviving members, but if the member dies, as in this case, between the time that the dues are mailed for transmission to the board of control at a distant point, in this case, Chicago, Illinois, and its receipt by the Board of Control there is no means by which his representative in interest or beneficiary in his policy can be restored from the penalty of the forfeiture. Policies of insurance are taken out and the whole scheme of insurance contemplates that it is not for the benefit of the insured, but for the benefit of those dependent upon him, and if you eliminate this element from it, Life Insurance as a system would be deprived of the main reason by which it has won its way to favor. And yet here the survivor can be relieved of forfeiture, and is relieved, "if within thirty days from suspension of warrant said Section shall pay to the Board of Control the amount of all monthly payments, assessments or dues accrued upon members," but he who dies, as stated, however prompt he may have been in payment of dues, and though no personal default can be attributed to him, still his policy is forfeited, and his beneficiary is without relief or any means by which he can save himself."

In the case of Jackson vs. North Western Mutual Relief Association, 47th North Western Reporter, pages 733 to 737, the facts were as follows: The by-laws provided that within six months after a forfeiture, the defaulting member might be re-instated by paying all arrearages, and furnishing a satisfactory certificate of health. After the assessment for which a forfeiture was claimed, several notices of subsequent assessments were sent the assured, each accompanied by a re-instatement contract for her to sign. Assured received the last of these notices on January 27th and on February 12th she signed the application for reinstatement, enclosed it, together with money for all arrearages, and a certificate showing her health to be as good as when she first entered the association, and carried the package to the post-office. While doing so she caught a cold and died the next day. The Company received the package the day after her death, and after knowledge thereof returned it to her address.

The opinion of the Court on the facts was as follows:

"It seems that the last package containing the money for all past

dues was received by the Company the 14th day of February next after it was mailed. It was laid aside on account of the sickness of the Secretary. In the meantime having heard of the death of Mrs. Jackson, he returned the money to her address on the 23rd or 24th of the same month. The Court instructed the jury on that subject as follows: 'That Mrs. Jackson was dead before the reinstatement and money reached Madison, if you find such to be the fact, was good cause for disapproval of her application.' This instruction was erroneous. If Mrs. Jackson mailed the papers and money, together with a certificate of health, in proper time, according to the by-laws or custom of the company, her rights became fixed by it, and her subsequent death before the package reached the company could not change them. She had done all that the company required of her by the notice of reinstatement. She was then reinstated, if she would have been had she not died until after the package had reached the company. Her death made no difference with her reinstatement."

Jackson vs. North Western Mut. Relief Assn., 47 N. W. Rep. 736-7.

See also:

Connelly vs. Association, (Conn.) 20 Atlantic Reporter, 671.

Stylow vs. Insurance Co., 34 N. W. Rep., 151.

Van Houten vs. Pine, 38 N. J. Equity, 72.

Oates vs. Supreme Court of Foresters, 4 Ontario Reports, 535.

Bacon on Benefit Societies and Life Insurance, Sec. 385, pages 576 to 582.

It will be observed that in the present case, under the rules of the order no forfeiture of the policy had occurred when Chadwick placed the money in the post office. We submit that under the course of dealing and by express direction the placing of the money by Chadwick in the post office was a payment and operated to prevent a forfeiture.

Buell vs. Chapin, 99 Mass. 594.

Gurney vs. Howell, 9 Gray, 404.

Crane vs. Pratt, 12 Gray, 348.

Morgan vs. Richardson. 13 Allen, 410.

Campbell vs. Supreme Lodge, 47 N. E. Rep., 109

If the Court should be of opinion that the by-law in question is applicable to the case at Bar, the defendant in the Court below is estop-

ped from insisting upon the forfeiture because of its previous custom and course of dealing with S. W. Chadwick. Chadwick's testimony shows that he had been Secretary of the Section of which Withers was a member for more than twenty years. He further testifies as follows: "It had never been the custom at my office for me to send the money off by the 20th of the month. I usually sent the money off about the last days of the month. "His testimony further shows that for the year previous to Withers death the remittances were made as a rule between the 28th and 30th of the month, and that all of the sums remitted were accepted by the Board of Control." It is true that he testifies that when the money reached Chicogo after the first of the month, the Secretary of the Board of Control mailed to him a letter informing him of the suspension of the Section, but he testifies that such letter was always destroyed by him and that he did not inform the members of the Section of the receipt of the same as he knew that the money had reached Chicago by the time he received the letter; No notice was ever given to Withers of the accustomed delinquency of Chadwick, and the defendant utterly failed to show that the Board of Control ever mailed to the President of the Section, as required by the very by-law invoked in this case, of such delinquency of Chadwick. If the Board of Control, as required by such by-law, mailed such notice to the President, it had possession of such proof and and it was the duty of the defendant to have made such proof, and as it utterly failed to make the proof, the presumption is that such letter was not mailed as required. We presume that notice was required to be given to the President of the Section of such delinquency in order that the Section might be informed of the failure of the Secretary to perform his duties, and as no notice was received by the President, the Section had a right to presume that the Board of Control was satisfied with the action of the Secretary, and the members had a right to rely on their payments made to Chadwick under the requirements of the law.

"Any agreement, declaration or course of action on the part of an insurance company which leaves a party insured honestly to believe that by conforming thereto a forfeiture of his policy will not be incurred, will estop the company from insisting on a forfeiture although it might be claimed under the express letter of the contract."

New York Life Insurance Co. vs. Egleston, 96 U. S. Reports (6 Otto), 572, L. C. P., Book 24. bottom page 342.

Phœnix Mutual Life Insurance Co., vs. Doster et als., (see S. C. 16 Otto, 30 to 38) L. C. P., Book 27, bottom page 65.

Bacon on Benefit Socities, etc., Lec. 361 to 362.

Manning vs. Ancient Order United Workmen (Court of Appeals of Kentucky, Oct. 8, 1887) 5 S. W. 385.

Supreme Lodge Knights of Pythias vs. Kalinsky, 57 Federal Reporter, 348.

Jackson vs. North Western Mutual Relief Assn., (Wis.) 47 N. W. Rep., 733.

Kenyon vs. Knights Templar, etc., (N. Y.) 25 N. E. Rep., 299.

Stylow vs. Insurance Co., (Wis) 34 N. W. Rep., 151.

Sweetzer vs. Odd Fellows Mut. Aid Assn., 117 Ind., 97.

The by-law insisted upon is not applicable to the case at Bar. The by-law was passed in 1894, long after the policy of insurance in this case had been taken out by Withers. Withers in his application for the policy agreed as follows: "This contract shall be controlled by all the laws, rules, and regulations of the order governing this Rank now in force, or that may hereafter be enacted." Reference is made to the case of Supreme Commandery, etc., vs. Ainsworth, 71 Alabama, 449. It will be observed that, in that case as well as in all cases expressing a similar view, the Courts hold that by laws enacted subsequent to the issuance of a policy, must be reasonable or they are void.

Allnut vs. Highcourt, etc., 28 N. W., 802.

People vs. Theatrical M etc., 8 N. Y. S., 675.

Erd vs. Bavarian Nat. Aid and Rel. Assn. of Detroit (Supreme Court of Michigan, Oct. 13th, 1887) N W. Reporter, 34, page 555.

Brady vs. Coachman, etc., 14 N. Y. State, 272.

Reasonableness of by-law a matter of law.

Am. & Eng. Ency. of Law (1st Ed.) Vol. 2, note 4, page 173.

The by-law insisted on is unreasonable and void Parties other than Withers and the Order are interested in the Policy. The beneficiary, the plaintiff in the Court below, has an interest therein, and to give this by-law the construction sought by the Order is to disregard the beneficiary altogether. In the first place it is unreasonable to require a man to pay money to a person designated by the payee, and to make the payor responsible for the neglect or fraud of the agent, without furnishing him with information of the neglect or fraud until after forfeiture is declared. It is certainly iniquitous to hold that a by-law is reasonable which gives to living members a method of reinstatement for the neglect of a third person, but which provides no remedy for one who performs his every duty, because he dies before he is, under the rules of the Order, permitted to take any step to protect himself against the neglect of such third person. This is the view taken by the Court below in its opinion, which is printed in the record

in this case.

True the appellant says this was a Beneficial Society, and the Section or Lodge of which Withers was a member, selected its Secretary, and thereby introduced him to the Board of Control as a person of credence, and for that reason the Section was bound by the Secretary's acts. In the first place, the proof shows that a Section of an Endowment Rank is composed of many members, and such rule would place one member of the Section at the mercy of an officer selected by a majority of the members of a Section. Such a doctrine might be invoked where only social rights are concerned. It cannot be invoked to destroy the property rights of a beneficiary, not a member of the Rank, or of a member of the Rank.

To use language heretofore quoted in this brief, the language of this by-law is "the words of the insurer, not of the insured." The designation of the Secretary of the Section as the agent for collecting and transmitting the money was an act of the Order, not an act of Withers or of the Section to which he belonged.

Benefit Societies are in law, Mutual Life Insurance Companies.

Erdman vs. Mutual Insurance Co. etc., 44 Wis. 376.

Bolton vs. Bolton, 73 Maine, 299.

Bacon on Benefit Societies, etc., Section 146.

There is no distinction between policies issued by a stock company and those issued by a mutual company.

Bacon on Benefit Societies, etc., Sec. 156.

If, however, the Court should be of opinion that the by-law in question is applicable to this case, and that Chadwick was the agent of Withers, and not of the Board of Control, the appellant is estopped from making the defense interposed because it retained the premium forwarded to it by Chadwick on the 31st day of October, 1895. If Chadwick was Withers' agent, his agency ceased on November 1st, 1895, when Withers died. The Company has not returned nor offered to return that money to any representative of the beneficiary in the policy or to any representative of the estate of Withers.

It is true that the Board of Control claims to have returned the money to Chadwick, but they admit that Chadwick returned the money to them and that they still hold it. "The doctrine of waiver applies to mutual benefit societies, and if assessments are received after the death of a member by the local lodge the retention of them by the Supreme Lodge waived the forfeiture."

Wickser vs. Knights of Honor, 12 S. W. Rep., 175.

Erdman vs. Mutual Ins. Co., 44 Wis. 276.

Supreme Lodge K. of P. vs. Taylor, 24 Southern Reporter, 247.

Ill. Masons' Benevolent Society vs. Baldwin, 86 Ill., 479.

Bacon on Benefit Societies, etc., Sec. 431.

The above argument is emphasized by the doctrine that forfeitures are not favored in law. If corporations are astute in contriving such provisions, Courts will take care that they shall not be used as instruments of fraud or injustice.

In the case of New York Life Insurance Company vs. Eggleston, (see S. C., 6 Otto, 572 to 580, L. C. P. Book 24, page 842), the Supreme Court say:

"We have recently in the case of Insurance Company vs. Norton, shown that forfeitures are not favored in the law; and that Courts are always prompt to seize hold of any circumstances that indicate an election to waive a forfeiture."

See further:

The Knickerbocker Life Insurance Co. vs. Norton, (see S. C. 6 Otto, 234 to 245) L. C. P. Book 24, bottom page 689,

Phœnix Life Insurance Co. vs. Doster (see S. C. 16 Otto, 30 to 38) L. C. P. Book 27, bottom page 66.

The gentlemen who appear for the Plaintiff in Error argue that the by-law as to the forfeiture is SELF EXECUTING. We join in no argument on that contention but we adopt their argument and cite the authorities cited by them that the compensatory provision as to reinstatement is also SELF EXECUTING. If the failure of the remittance to reach the Board of Control on or before the last day of the month, put the law concerning the forfeiture immediately into operation, then the placing of the money in the mail addressed to the Board of Control, before the expiration of the thirty days created on the instant a reinstatement of the Section. If the membership of the Section became forfeited at midnight of October 31st, 1895, then the next moment the Section became reinstated, under the argument of the gentlemen, and under the language of the by-law, which is as follows: "Provided, that the section whose membership has forfeited their endowment; and whose warrant has been suspended, shall regain all right as a Section, and any surviving members thereof (not less than five) shall regain full rights and privileges held previous to such forfeiture, if within thirty days of suspension of warrant said section shall pay to the Board of Control the amount of all monthly payments assessments and dues accrued upon said members."

Withers was alive when the money was placed in the postoffice, and and he and the Section became immediately reinstated if there was ever

a forfeiture, because that was the provision ol the rule above quoted, and the placing of the money in the postoffice was, by course of dealing and express direction, a payment.

Buell vs. Chapin, 99 Mass. 594.

Curney vs. Howell, 9 Gray. 404.

Crane vs Pratt, 12 Gray, 348.

Morgan vs. Richardson, 13 Allen, 410.

Campbell vs Supreme Lodge, 47 N E. Rep. 109.

In arguing that Chadwick was the agent of the deceased and not of the Corporation, counsel doubtless overlooked the provisions of Section 10, as follows: "Sections of endowment rank shall be responsible and liable to the board of control for all moneys collected by the Secretary, or other officers, from the members for monthly payments, assessments or dues not paid over to the board within the time and manner prescribed by law."

They assert on the one hand that the officers are not their agents, on the other they hold the section liable TO THE CORPORATION for the money collected by these same officers. How could the Section be considered liable unless the money so paid to the officers belonged to the Board of Control? How could the Board of Control set up claims to the money of a member in the hands of HIS agent? It cannot claim with one hand and repudiate with the other. The very fact of fixing the liability to the BOARD OF CONTROL of the Section for the money in the hands of the Secretary fixes him as the agent of the Corporation in a manner that no subsequent disclaimer can overcome. As we have shown from the authorities cited above this assertion that the officers of the Section are agents of the members and not of the Company is a mere sham. a trick, a wornout device to escape liability on a false statement of fact.

On page 19 of brief for Plaintiff in Error counsel say: "In the case at Bar a notice of suspension was invariably given when there was a delayed remittance from the Section." This is an assertion that is not borne out by the Record. It is shown in there that Chadwick, the Secretary who was delinquent under the claim of the Plaintiff in Error received a notice, and that notice stopped with him. The laws required that not only the Secretary but the President also should receive notice of the failure of the Section to remit, on the idea, we suppose, that it was not to be supposed that a defaulting or delinquent Secretary would be diligent to discover the fact of his default or delinquency to the injured membership. Was any notice ever sent, in accordance with the by-law, at any time, to the President? If such notice was sent the possession of the proof was peculiarly in the

possession of the Plaintiff in Error. It utterly failed to make such proof. The only notice ever sent according to the proof was the notice sent to Chadwick, and that, according to his testimony was destroyed and never presented to the Section or any member thereof. No notice was ever brought home to Withers or the Section of Chadwick's accustomed delinquency.

On page of brief for Plaintiff in error counsel say:

"Expressions may be found in a few decisions to the effect that subordinate lodges, and their officers are agents of the supreme lodge, but these views were expressed in cases where there was no provision to the contrary as in this case."

In Whitesides vs. Supreme Conclave Improved Order Hephtasophs, 82 Fed. Rep. 275, the question of agency was determined against the contention of Plaintiff in Error, where there was a provision in the by-laws to the same effect as in the present case.

See also

Bacon on Benefit Societies etc, Section 426 and authorities cited.

On page 33 of their brief counsel say:

"It was stated in brief for defendant in error in the Court below that:

"It had been the habit of the Secretary of the Section for several years to mail his remittance to the board too late to reach Chicago until after the first of the month."

This statement is not justified by the record.

Replying to this the record shows that for the year preceding the last remittance for Withers, that the remittance mailed October 31st, leaving Greensboro Nov 1st, reached Chicago on November 4th, occupying in transit fully three days. Therefore the remittance made October 27th, 1894 reached Chicago before the first of the month, the remittance of November 28th, 1894 reached Chicago after the first. The same is true by the application of the same calculation to the remittances of December 29th, 1894, January 29th. February 27th. March 30th, April 29th, June 29th, August 28th, September 28th, and October 31st, all in 1895. Thus it is seen that by adopting the calculation most favorable to the Plaintiff in Error and assuming that the remittances commenced the journey the day they were mailed, of which there is no proof, but rather proof to the contrary, all of the said remittances except the first were bound to have been received after the first of the month, and if all took the course of the October 1895 remittance and started the day after they were mailed, all were received after the first of the succeeding month. Counsel assert that the distance from Chicago to Greensboro is about nine hundred miles. There is nothing in the evidence on which to base the assertion.

The Court will observe from Chadwick's testimony, that not only did his remittances fail to reach Chicago before the first of the month, but that from May to October he was a month behind. (Transcript page 12). Thus on October 27th, 1894, he remitted for October, on November 28th, 1894. he remitted for November, on December 29th, 1894, he remitted for December, on January 29th, 1895 he remitted for January, on February 27th, 1895 he remitted for February, on March 30th, 1895 he remitted for March, on April 29th, 1895 he remitted for April, THERE WAS NO REMITTANCE IN MAY. On June 29th, 1895 he remitted for June, on July 8th, 1895 he remitted for June, on Augst 29th, 1895 he remitted for July, on September 28th; 1895 he remitted for August, on October 28th, 1895 he remitted for September and on October 31st, 1895 he sent the October dues. He commenced to fall a month behind in May not catching up until October 31st, 1895.

Neither is there anything in the record to show that the October remittance was "probably received at Chicago on November 3rd, which was Sunday."

The evidence is that it was received in Chicago on November 4th. (See Transcript page 15).

As stated in the beginning of this brief the appellant corporation was not organized for the profit of its members, but to enable them to make provision for those dependent on them beyond the point where human effort must end. For this purpose it was created. For this purpose Robert W. Withers became on January 1st, 1883 identified with its membership, and continued till October 1895 to pay into its treasury each month the amount of his contractual liability. During that period he has perhaps received some of the insignia or regalia of the Order. This, if the contention of the Plaintiff in Error is sustained, is all his widow will receive. An inadequate memorial of his years faithful membership, and all that his honest efforts to provide for his widow will leave her as the result of his connection with the Order, that and the memory of his membership.

All of which is respectfully submitted,

Edward Osgoodby Jr.
For Defendant in Error